Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1131

ROBERT J. AWERKAMP,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented For Review	2
Statement of the Case	2
Reasons For Granting the Writ	4
Conclusion	7

Appendix

Unpublished Order, United States vs. Awerkamp No. 78-2084	A-1
Order Denying Petition For Rehearing En Banc	A-5
Government Exhibit No. 5	A-6
The Law	A-8
Statutes	A-10

TABLE OF AUTHORITIES

Cases:

United States v. Carter, 454 F.2d 426 (4th Cir., 1972) ... 5

Heligman v. United States, 407 F.2d 488 (8th cir., 1969) 6

Irwin v. United States, 561 F.2d 198 (10th Cir., 1977) ... 6

In re: Hoffman Can Corporation, 373 F.2d 622 (3rd Cir., 1967) 7

Hoffman v. United States, 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951) 6,7

Statutes:

26 U.S.C. Section 7203 ..... 2,A-1

28 U.S.C. Section 1254(1) 2

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Petitioner, Robert J. Awerkamp, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on the above captioned cause on August 16th, 1979; Petition for Rehearing en Banc being denied on November 15th, 1979.

OPINION BELOW

The opinion of the Court of Appeals below was rendered in an unpublished order rendered in United States of America vs. Robert J. Awerkamp unpublished order No. 78-2084, entered August 16th, 1979, as appended herein. There was no opinion filed by the District Court. Petitioner's motion for rehearing was denied by the Court of Appeals a copy of which is appended herein.

JURISDICTION

The judgment of the Court of Appeals was entered on August 16th, 1979. Petitioner's Petition for Rehearing En Banc was denied on November 15th, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court erred in failing to direct a verdict for the Petitioner on Counts I, II and III of the indictment as a result of an express grant of immunity to the Petitioner in a civil proceeding in 1973.

II. Whether the Court erred in concluding that Petitioner's claim of Fifth Amendment privileges was not made in good faith where it failed to examine evidence proferred in support of that claim.

STATEMENT OF THE CASE

This action was originally brought in the United States District Court for the Southern District of Illinois, Southern Division, before the Honorable J. Waldo Ackerman, cause No. 78-CR-30008. Petitioner was indicted on four (4) counts of willful failure to file income tax returns in violation of 26 U.S.C. Section 7203, in that Petitioner failed to file the required federal income tax forms in 1971, 1972, 1973 and 1974. Petitioner offered into evidence 1040 forms, which had apparently been amended and not timely filed, for the years 1971, 1972 and 1973. The return filed by Petitioner for the year 1974 contained Petitioner's name, his filing status, his wife's occupation, his claim of two (2) exemptions and an entry of the word "NONE" with regard to a question concerning alimony payments. The form was unsigned and all other entries were unanswered under claim of Fifth Amendment privilege. With regard to the 1974 return, Petitioner offered information in a sealed envelope for

in camera inspection by the trial Court in order to substantiate his claim of a Fifth Amendment privilege. The trial Court refused to review this information. The trial Court also refused to grant Petitioner a directed verdict with regard to the first three (3) counts of the indictment for which Petitioner asserted a grant of immunity. The basis of Petitioner's claim of a grant of immunity arose from a declaratory judgment action instituted by Petitioner in 1973 in the United States District Court for the Southern District of Illinois before Judge Omer Poos. In that action, Petitioner attempted to establish the proper procedure for claiming his Fifth Amendment privilege against self-incrimination on his tax returns. Petitioner was expressly granted immunity by Judge Poos from prosecution for claiming his Fifth Amendment rights for the tax years of 1971, 1972 and 1973 evidence from which grant of immunity was proferred at the trial of the instant case. There was testimony at the trial of this case by Internal Revenue Agent, Louis Marberry, who had been present at the declaratory judgment action, that Judge Poos had promised immunity to Petitioner. Government Exhibit No. 5 also contains a partial transcript of Petitioner's conversation with Judge Poos regarding the grant of immunity.

The District Court, after a jury trial, found Appellant guilty on May 17th, 1978, on all four (4) counts. Petitioner appealed his conviction to the Seventh Circuit Court of Appeals. The Court of Appeals affirmed the judgment of the trial Court in an unpublished order dated August 16th, 1979. Petitioner filed a Petition for Rehearing En Banc which was denied on November 15th, 1979. Petitioner now petitions this Court for a Writ of Certiorari to review his conviction.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit Court of Appeals has decided on an important question of federal law and their decision directly conflicts with the holdings of other United States Circuit Courts of Appeal. This Court should settle this controversy so that the same rule of law may be uniformly applied throughout the United States. The Seventh Circuit Court of Appeals has also departed from the excepted and usual force of judicial proceedings so as to call for an exercise of this Court's power of supervision.

The Court of Appeals agreed with the Government's argument that no evidence of a grant of immunity was submitted at trial. It is respectfully submitted that evidence supporting Petitioner's grant of immunity was adduced at trial and Petitioner, therefore, was entitled to a directed verdict with respect to the tax years for which the grant of immunity was given. There was testimony at the trial of this case by Internal Revenue Agent, Louis Marberry, who had been present at the declaratory judgment action, that Judge Poos had promised immunity to Petitioner.

> Q: (Mr. Awerkamp) You do recall some things, all right. Do you remember Judge Poos telling me that he would protect me from criminal prosecution for claiming my Fifth Amendment Rights? Do you remember him telling me that?
>
> A: (Mr. Marberry) Yes, sir.

Further, Government Exhibit No. 5 also contained a partial transcript of Petitioner's conversation with Judge Poos regarding the grant of immunity. (Appendix page A-7, 8). Government Exhibit No. 5 was appended to Petitioner's reply brief on the appeal of this case to the Seventh Circuit Court of Appeals. Petitioner contends that the grant of immunity asserted by Petitioner both at trial and on appeal was sufficiently introduced at

trial for the Court to have taken note of it and directed a verdict for the Petitioner on Counts I, II, and III of the indictment. Alternatively, Petitioner would argue that even should the Court conclude that insufficient evidence to establish a grant of immunity was introduced, the Petitioner has made the allegation of a grant of immunity which has been found to be sufficient to warrant a remand of a case for evidentiary determination of that issue. *United States* vs. *Carter,* 454 F.2d 426, (4th Circ., 1972). In *Carter*, Defendant alleged that the prosecution had assured him that he would not be prosecuted for the commission of the crimes he divulged with the exception of a guilty plea to a misdemeanor offense. This assurance was given in exchange for information leading to the apprehension of others involved in criminal activities. The Court of Appeals vacated Defendant's conviction connected with crimes for which he alleged he had been granted immunity from prosecution. The Court states:

> "There is more at stake than just the liberty of this Defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government. *U.S.* vs. *Carter, supra.*, at 428."

It is urged that the same considerations of sound public policy and confidence in the judicial system apply in this case. Petitioner would request that this cause be remanded for an evidentiary hearing on the issue of the grant of immunity, as the Court in *Carter* did, where the allegation of immunity made at the trial level and the appellate level should have, in the normal course of judicial proceedings, necessitated a determination of whether Petitioner was entitled to immunity from prosecution. Petitioner respectfully requests the Court settle the conflict between the Circuits as to the procedure to be followed once a Petitioner has alleged a grant of immunity and submitted evidence in support of that grant.

II. The Appellate Court rejected Petitioner's argument that his Fifth Amendment claims were made in good faith, concluding that Petitioner had made what constituted a "blanket assertion" of his Fifth Amendment right on his income tax return. Petitioner included his name, his filing status, his wife's occupation, his claim of two (2) exemptions and the response "NONE" to the question concerning alimony payments. Petitioner contends that the Appellate Court erred in affirming the trial Court's conclusion that his claims were not made in good faith based on the trial Court's failure to consider all the evidence submitted to it in support of the claim of good faith.

At trial, Petitioner, in order to substantiate his claim of a good faith assertion of his Fifth Amendment rights and to demonstrate that completing the income tax forms with any information in addition to that which he had provided would subject him to criminal charges, tendered to the trial Court a sealed envelope for *in camera* inspection. The information Petitioner attempted to submit to the Court specified the basis for his Fifth Amendment claims and the necessity for asserting his claim in response to the questions on the tax form. *Heligman* vs. *United States,* 407 F.2d 488, (8th Circ., 1969) and *Irwin* vs. *United States,* 561 F.2d 198, (10th Circ., 1977) made it clear that the taxpayer may refuse to answer questions on his tax return based on his Fifth Amendment rights and the Court, not the taxpayer, must make a determination based upon some showing by the taxpayer as to whether the Fifth Amendment claim is justified. Petitioner attempted to furnish the Court with his rationale for claiming the Fifth Amendment and the manner in which he claimed it. The Court refused to examine the tendered explanation.

In *In re: Hoffman Can Corporation,* 373 F.2d 622, (3rd Circ., 1967), the Court found that requiring the submission of a sealed envelope containing information substantiating Appellants' claims of their Fifth Amendment rights to be an overly intrusive manner of determining the propriety of asserting the

Fifth Amendment. In this case, Petitioner voluntarily proffered material for the Court's inspection and to aid it in its determination of whether the Petitioner was justified in asserting his Fifth Amendment rights. In essence, Petitioner invoked his privilege in the presence of the trial judge and the trial judge was required to evaluate the Petitioner's invocation. *In re: Hoffman Can Corporation, supra.* As the Court in *In re: Hoffman Can Corporation, supra.,* noted with respect to Fifth Amendment claims

> "(S)uch claims peculiarily require a judgment based upon a delicate weighing of all surrounding circumstances." *In re: Hoffman Can Corporation, supra.,* at page 628.

The trial judge here cannot be said to have weighed all the surrounding circumstances including the peculiarities of the particular case. *Hoffman* vs. *United States,* 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 1118 (1951).

It should also be noted that Petitioner's good faith was further manifested by the maintaining of a declaratory judgment action which he brought to establish the proper procedure for asserting his Fifth Amendment rights. Petitioner acted in reliance on the outcome of those proceedings when asserting his Fifth Amendment rights.

Petitioner respectfully requests this Court determine, as an important question of federal law, the proper procedure for a Petitioner to present to the Court an order for the Court to consider and evaluate all evidence of good faith, his basis for asserting a Fifth Amendment claim.

CONCLUSION

Petitioner respectfully requests that this Court grant this Writ of Certiorari in order to determine the questions raised in this Petition.

First, Petitioner's allegation and submission of evidence in support of a grant of immunity requires an evidentiary determination, in the interests of sound public policy and consistency among the Circuits, whether Petitioner was granted immunity. If Petitioner was granted immunity from prosecution Counts I, II and III of the indictment, then this Court should make a determination of whether the trial Court erred in refusing to grant a directed verdict for the Petitioner on Counts I, II and III of the indictment.

Second, in the interests of developing a defined and consistent federal law this Court should grant a Writ of Certiorari in this case to determine the proper procedure for a Petitioner to submit to the trial Court evidence of his good faith in asserting his Fifth Amendment rights on federal income tax returns.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Unpublished Order Not To Be Cited Per Circuit Rule 88

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued April 6, 1979
August 16, 1979
Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Walter E. Hoffman*, Senior District Judge

No. 78-2084

United States of America, Plaintiff-Appellee, vs. Robert J. Awerkamp, Defendant-Appellant,	On appeal from the United States District Court for the Southern District of Illinois, Southern Division No. 78-Cr.-30008 J. Waldo Ackerman, Judge

ORDER

This is an appeal by Robert J. Awerkamp from his jury conviction on four counts of willfully failing to file his income tax returns for the years 1971, 1972, 1973, and 1974, in violation of 26 U.S.C. §7203. Awerkamp was sentenced to one year imprisonment on Count One and imposition of sentence on Counts Two, Three, and Four was suspended. He was also given five years of probation to commence after any parole supervision on Count One.

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*The Honorable Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

On appeal, Awerkamp argues that the trial judge failed to instruct the jury as to his right to claim his Fifth Amendment privilege on his tax returns, failed to instruct the jury that the "willful" element charged in the information should be defined as including "bad purpose" or "evil motive," and failed to direct a verdict for him on Counts One, Two, and Three of the information based on an alleged grant of immunity. For the following reasons, we reject these arguments and affirm the district court.

Right to Claim Fifth Amendment

The evidence at trial showed that the defendant had not filed an income tax return for the years 1971, 1972, and 1973. The records of the IRS did show that a document had been filed by Awerkamp in 1974. The document was a Form 1040 on which Awerkamp claimed the Fifth Amendment for all entries on the form except for his name, his filing status (married filing separately), his wife's occupation (housewife), his claim of two exemptions and his entry of the word "none" concerning alimony payments. The form was not signed or dated. He also claimed the Fifth Amendment on the form in refusing to give the first names of his children.

We note that appellant's brief does not point to any requested instruction concerning the right to claim the Fifth Amendment on tax returns. Assuming such an instruction was requested, it was properly refused.

Appellant relies on *United States* v. *Sullivan,* 274 U.S. 259 (1927), and *Garner* v. *United States,* 424 U.S. 648 (1976), for the proposition that the privilege against self-incrimination can be claimed on income tax returns. Appellant is correct. However, the claimed privilege discussed in *Sullivan* and *Garner* must be made for a specific reason. The withheld information must lead to discovery of a crime, *United States* v. *Sullivan, supra,* at 263, and a person can claim the privilege for certain

specific information but cannot refuse to make any return at all, *Garner* v. *United States, supra,* at 650. In *Garner,* the Court stated that certain information would be so neutral as to cause the privilege to be claimed rarely, if ever. 424 U.S. at 650, n.3.

Appellate courts which have considered blanket declarations of the Fifth Amendment privilege, such as Awerkamp made in his 1974 return, are unanimous in holding that such blanket declarations are failures to file a return as required by law. *United States* v. *Johnson,* 577 F.2d 1304 (5th Cir. 1978); *United States* v. *Jordan, 508 F.2d 750 (7th Cir. 1975) cert. den.* 423 U.S. 842, *reh. den.* 423 U.S. 991; *United States* v. *Daly,* 481 F.2d 28 (8th Cir. 1973) *cert. den.* 414 U.S. 1064; *United States* v. *Porth,* 426 F.2d 519 (10th Cir. 1970) *cert. den.* 400 U.S. 824.

Our decision in *United States* v. *Jordan, supra,* makes it clear that a Fifth Amendment claim must be valid in order to be considered in a 26 U.S.C. §7203 prosecution and that to be valid "the taxpayer, cannot assert the privilege to every question asked by the examiner, most of which are innocuous on their face." 508 F.2d at 752, *quoting, United States* v. *Daly,* 481 F.2d at 30. Awerkamp's return was devoid of financial information and it is clear from its face that it was not made in good faith. It was not even signed. Such a claim of the Fifth Amendment privilege against self-incrimination is not valid and the district judge properly refused to instruct the jury that it was valid.

Willful Element of Charge

The claim that the element of willfulness in a 26 U.S.C. §7203 is defined as "bad purpose" or "evil motive" is frivolous. The Supreme Court's decision in *United States* v. *Pomponio,* 429 U.S. 10 (1976) *reh. den.* 429 U.S. 987, held that willfulness in an income tax prosecution does not require proof of a motive other than an intentional violation of a known legal duty.

Alleged Grant of Immunity

Awerkamp claims that United States District Court Judge Omer Poos (now deceased) told him in connection with a declaratory judgment action brought by Awerkamp over his 1971 and 1972 taxes, that he would not be prosecuted for claiming his Fifth Amendment rights for tax years 1971 and 1972. Appellant produced no evidence of such a grant at trial; he did not tender a transcript of the proceeding.

Awerkamp's own quotations from the transcript of that proceeding, contained in a trial brief he filed, clearly shows that Judge Poos merely informed Awerkamp that the IRS could not force him to appear before an IRS agent and give testimony against himself. The district judge correctly refused to direct a verdict on the basis of Awerkamp's unfounded claim.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 15, 1979
Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Walter E. Hoffman*, Senior District Judge

No. 78-2084

United States of America, Plaintiff-Appellee, vs. Robert J. Awerkamp, Defendant-Appellant,	On appeal from the United States District Court for the Southern District of Illinois, Southern Division No. 78-Cr.-30008 J. Waldo Ackerman, Judge

ORDER

Treating the "Petition for Rehearing *En Banc*" as a petition for rehearing under Rule 40, F.R.AP., the members of the original panel having voted to DENY,

Treating the petition as a suggestion for rehearing *en banc* under Rule 35, F.R.A.P., no judge** in regular active service having requested a vote thereon,

Accordingly, IT IS ORDERED that the petition for rehearing *en banc* is hereby, DENIED.

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*Honorable Walter E. Hoffman, Senior District Judge for the Eastern District of Virginia, is sitting by designation, and did not participate in the consideration of *en banc* rehearing.

**Circuit Judge Harlington Wood, Jr. did not participate in the consideration of the petition for rehearing *en banc*.

PARTIAL TRANSCRIPT SUBMITTED AS GOVERNMENT EXHIBIT NO. 5 AND APPENDED TO PETITIONER'S REPLY BRIEF

THE COURT: You can always maintain your Constitutional rights, nobody can force you to surrender them. (TR 71)

THE COURT: True, they can't require him to violate his Constitutional rights, . . . (TR 73)

MR. AWERKAMP: Yes, Your Honor, they have ordered me to bring my books and records and give testimony. THE COURT: Well, all you have to do is appear before them, and say I will not do it, because it might tend to incriminate me and violate my rights under the 5th Amendment of the Constitution of the United States. (TR 73-74)

THE COURT: Nobody can compel you to waive your Constitutional rights. (TR 75)

THE COURT: Well, the only interpretation that I give the Constitution is that it means what it says. . . . you can't be required to incriminate yourself by giving that evidence. (TR 76)

THE COURT: . . . and you are always required to obey the law unless it infringes on your constitutional rights . . . I think your constitutional rights to not give testimony against yourself are always adequately protected. (TR 77)

THE COURT: . . . but I don't think I could punish you nor could anybody punish you by requiring you to waive the constitutional rights, . . . (TR 80)

MR. AWERKAMP: (In referring to *Hill* v. *Philpott,* 445 F.2d 144) . . .I felt that their reasoning was that the Government had no right to use a man's records against himself. THE COURT: I will be inclined to agree with you. (TR 82)

THE COURT: That's the only—but I couldn't compel you to give testimony against yourself, because that's a constitutional right that I have to protect. (TR 83)

THE COURT: Well, you'll be protected by this Court against a criminal case from anybody trying to indulge /sic/ something against your constitutional rights. MR. AWERKAMP: Thank you, Your Honor. THE COURT: No doubt about that. (TR 84)

THE COURT: Well, would you be willing to, if he comes in and talks to you, to give him the privilege of being not prosecuted for the violation of a constitutional right? MR. HOENIG (attorney for the Government): No, Your Honor, I have no authority to do that. THE COURT: Then you don't have that authority, then I don't think you can go that far. MR. HOENIG: I myself don't. The situation is that if—if the man—if Mr. Awerkamp does have a legitimate fear of self-incrimination as to each—. THE COURT: That isn't for you to question. He is tne man that has the constitutional right to raise it. And if he has the fear, and he is relying on his constitutional right, you can't go beyond that. (TR 86)

Mr. HOENIG: Now the question comes whether or not he legitimately has this fear or whether he just makes a blanket privilege—. THE COURT: (Interposing) That isn't a question for you to raise, I don't think. (TR 87)

THE COURT: This man can claim that constitutional right any time he wants to. MR. HOENIG: He can. THE COURT: And nobody can prevent him from claiming it. You can't, you can't disobey—. MR. HOENIG: (Interposing) We are not trying—we are not saying that he does not have the right to invoke the 5th Amendment privilege. THE COURT: That's what he has done then. MR. HOENIG: But what we are saying is that he can only invoke it if, if he is in legitimate fear of criminal prosecution, and—. THE COURT: (Interposing) That isn't what

the Constitution says. The Constitution says nobody can be compelled under guise of law to give testimony against themselves. MR. HOENIG: That's true, in fear, but again we have to determine, the Court—it's the discretion of the Court to determine—. THE COURT: (Interposing) No, it is not the Court's discretion, it is what the Constitution says. (TR 89-90)

THE LAW

I. Whether the Court erred in failing to direct a verdict for the Petitioner on Counts I, II and III of the indictment as a result of an express grant of immunity to the Petitiner in a civil proceeding in 1973.

United States vs. *Carter,* 454 F.2d 426, (4th Circ., 1972)

II. Whether the Court erred in concluding that Petitioner's claim of Fifth Amendment privileges was not made in good faith where it failed to examine evidence proffered in support of that claim.

Heligman vs. *United States,* 407 F.2d 488, (8th Circ., 1969)

Irwin vs. *United States,* 561 F.2d 198, (10th Circ. 1977)

In re: Hoffman Can Corporation, 373 F.2d 622, (3rd Circ., 1967)

Hoffman vs. *United States,* 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 1118 (1951)

STATUTES

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code of 1954, Section 7203, Title 26 U.S.C, Section 7203

Wilful Failure to File Return, Supply Information, or Pay Tax

Any person required under this title to pay any estimated tax or taxes or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or taxes, make such return, keep such records, or supply such information, at the time or times provided by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than one (1) year, or both, together with the costs of prosecution.